FEDERAL REGISTER: 53 FR 40828 (October 18, 1988)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 785 and 823
Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Prime Farmland

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI), in cooperation with the USDA, Soil Conservation Service (SCS), is amending certain portions of its rules applicable to prime farmland, including Section 785.17 of 30 CFR Part 785 and Sections 823.11, 823.12, and 823.14 of 30 CFR Part 823. This action is being taken, in part, to implement a decision of the U.S. District Court for the District of Columbia. The amended rules: (1) Provide guidance in implementing an exclusion from the Surface Mining Act's prime farmland provisions for coal mine waste storage areas associated with underground mines; (2) provide special consideration for the removal and replacement of B and C soil horizons, where removal is unnecessary and would not normally be required; and (3) eliminate the water body exemption in consideration of the district and appeals courts' decisions. The rule also provides clarification that water bodies continue to be allowed on post-mining non-prime farmland portions of permit areas provided that the aggregate total prime farmland acreage is not decreased from that which existed prior to mining and that certain other conditions are met.

EFFECTIVE DATE: November 17, 1988.

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SUPPLEMENTARY INFORMATION:

I. BACKGROUND

STATUTORY BACKGROUND

The Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), *30 U.S.C. 1201* et seq., contains special permitting and performance standards governing mining on prime farmland as defined in section 701(20) of the Act. Permit application information and approval requirements are contained in sections 507(b)(16), 508(a)(2)(C), 508(a)(5) and 510(d) of the Act.

Section 507(b)(16) of the Act requires that permit applications include a soil survey for those lands in the application which a reconnaissance inspection suggests may be prime farmland. Section 508(a)(2)(C) of the Act requires that permit applications contain a statement of the productivity of the land prior to mining including the appropriate classification as prime farmland, as well as the average yield of food, fiber, forage or wood products from such lands obtained under high levels of management. Section 508(a)(5) of the Act requires a plan for soil reconstruction, replacement, and stabilization pursuant to the prime farmland performance standards of section 515(b)(7) of the Act. Moreover, section 510(d)(1) of the Act provides that the regulatory authority shall grant a permit to mine on prime farmland only after consultation with the Secretary of Agriculture, and if the regulatory authority finds in writing that the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in section 515(b)(7) of the Act.

Statutory performance standards for prime farmland are found in sections 515(b)(7) and (b)(20) of the Act. Section 515(b)(7) sets forth minimum requirements for soil removal, storage, replacement, and reconstruction. Section

515(b)(20) establishes when the period of responsibility for successful revegetation begins and provides an exception to vegetative cover requirements when the regulatory authority makes a written finding approving a long-term, intensive, agricultural postmining land use. In addition, section 519(c)(2) states that performance bonds shall not be released until soil productivity for prime farmland has returned to equivalent levels of yield as unmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey.

Section 516 of the Act requires the Secretary to promulgate rules to regulate the surface effects of underground coal mining operations. However, in adopting such performance standards, permit requirements, and bonding rules, the Secretary must consider the distinct differences between surface coal mining and underground coal mining in accordance with section 516(a), section 516(b)(10), which makes the prime farmland performance standards applicable, and section 516(d), which makes the permit application and bonding requirements applicable. Also, according to section 516(a), such rules shall not conflict with nor supersede any provision of the Federal Coal Mine Health and Safety Act of 1969 or rules implementing that act.

With respect to coal mine wastes incident to underground mining operations, section 516(b)(3) of SMCRA requires operators to maximize to the extent technologically and economically feasible the return of coal wastes to the mine workings or excavations. Under 30 CFR 784.25 and 817.81(f), disposal of coal mine waste in abandoned underground mine workings must be performed in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration.

Note. -- Apart from the SMCRA requirements, it is also necessary to have the approval of the Environmental Protection Agency, pursuant to their regulations governing water quality, before coal mine wastes can be returned to underground workings.

To the extent the surface disposal of coal mine waste cannot be avoided, section 516(b)(4) of SMCRA requires that any remaining waste piles be stabilized, leachate meet applicable Federal and State laws, the final contours be compatible with natural surroundings, and that the site be revegetated in accordance with section 516. Also, where the surface disposal of coal mine wastes occurs, section 516(b)(5) of SMCRA requires the operator to treat all existing and new coal mine waste piles used either temporarily or permanently as dams or embankments in accordance with standards and criteria that conform to the standards and criteria used by the Chief of Engineers (U.S. Army Corps of Engineers) to insure that flood control structures are safe and effectively perform their intended function. In addition, OSMRE's standards and criteria must provide for regulatory approval, inspection, and oversight of all aspects of the design, construction, modification, maintenance, removal, and abandonment of coal waste impounding structures. Those standards and criteria are implemented by 30 CFR 817.49, 817.81, 817.83, and 817.84 of the permanent program performance standards.

Rules implementing prime farmland permitting, bonding and performance provisions are found at 30 CFR 785.17, 800.40 and Part 823.

REGULATORY BACKGROUND AND COURT DECISIONS

On March 13, 1979, OSMRE published prime farmland rules which affected both surface and underground mining operations. Complaints were made in the district court that: (1) The prime farmland requirements should only refer to the mining area and not support facility areas; (2) underground mining operations create minimal surface disturbance to the environment and therefore are a de minimis problem; and (3) the maintenance of soil stockpiles for 20 to 40 years would create little agricultural gain, but would necessitate great operator expense and effort. The district court ruled that the prime farmland performance standards of the Act do apply to the surface effects of underground mining operations but suggested that a limited exemption be made for surface facilities which are actively used over extended periods of time but which affect a minimal amount of land.

On May 3, 1982 *(47 FR 19076* et seq.), OSMRE proposed rules in consideration of the U.S. District Court order of May 16, 1980, remanding to the Secretary of the Interior portions of his March 13, 1979 prime farmland rules as they applied to underground mining. In re: Permanent Surface Mining Regulation Litigation, No 79-1144 (D.D.C.) May 16, 1980, Mem. Op. at 1-3 (In re: Permanent).

Final rules implementing that decision were published on May 12, 1983 *(48 FR 21446* et seq.), and became effective on June 13, 1983. At that time OSMRE published final Section 823.11(a) which excluded from the special prime

farmland performance standards land occupied by coal preparation plants, support facilities, and roads associated with surface and underground mines. Following promulgation of the final rule, the National Wildlife Federation (NWF) challenged the exemption insofar as it applied to surface facilities of surface mines. NWF also asserted that the rule did not contain adequate guidance on the spatial and temporal limits concerning excluded land for underground mines. On October 1, 1984, the U.S. District Court for the District of Columbia remanded the regulation which extended the exemption to surface facilities associated with surface mines. (In re: Permanent Surface Mining Reclamation Litigation II, No. 79-1144 (D.D.C.) October 1, 1984, Mem. Op. at 21-23 (In re: Permanent II)). The court explained that the rationale for its 1980 opinion, the difference between surface and underground mining operations, does not apply to surface mines where topsoil need not be stored for many years but can be redistributed over the areas disturbed by surface operations. The court agreed that the exemption from the special prime farmland standards did apply to the listed surface facilities for underground mines. The court also held that the Secretary has a duty to "flesh out" the statutory requirements and provide guidelines limiting the scope of this exemption. (In re: Permanent II at 23).

On March 19, 1986, OSMRE involved major external groups in its regulatory process through an outreach program designed to obtain comments on initial drafts of significant rulemakings prior to development of proposed regulations. Nine commenters provided comments to OSMRE on the initial draft of these prime farmland rules.

On March 25, 1987 *(52 FR 9644),* OSMRE proposed rulemaking to respond to the court's October 1, 1984 ruling. In that notice, OSMRE solicited public comments and made provision to hold public hearings upon request. During the 70-day comment period, eight commenters, including representatives of industry, government agencies, and citizen and environmental groups submitted numerous comments on the proposed rule. No public meetings or hearings were requested, and none were held.

Subsequently, on January 29, 1988 the U.S. Court of Appeals, D.C. Circuit, upheld the decision by the U.S. District Court for the District of Columbia on the issue of the construction of water impoundments on prime farmland. *NWF v. Hodel, 839 F2d 694, at 719.* (D.C. Cir., 1988) (NWF v. Hodel). The appeals court decision came at a time when the Office of Surface Mining Reclamation and Enforcement (OSMRE) was in the process of preparing this final rule. To ensure that the final rule would be responsive both to the Court decisions and to comments received on the proposed rule, OSMRE decided to make a careful reexamination of certain issues involving the restoration of prime farmland and related to the creation of water bodies on permit areas containing prime farmland prior to promulgating this final rule.

Therefore, on March 23, 1988 *(53 FR 9453)* OSMRE reopened the public comment period on the water bodies issue for 30 days. Subsequently, in response to a written request from the American Mining Congress the reopened comment period on the water bodies issue was extended until May 12, 1988. In the March 23 notice OSMRE solicited the views of regulatory authorities, SCS State Conservationists, surface mine operators, and all other interested persons on the circumstances under which impoundments may be created within permit areas containing prime farmland and on the related experiences of the regulatory authorities, SCS State Conservationists, and surface coal mine operators in relocating prime farmland soils within permit areas.

II. DISCUSSION OF FINAL RULE AND RESPONSE TO COMMENTS

During the reopened comment period commenters including representatives of industry, regulatory authorities, SCS State Conservationists, and citizen/environmental groups, provided OSMRE with numerous comments. Two commenters generally supported the revised proposal, and one was generally opposed. In addition, two commenters reiterated comments they had made during the 1987 comment period and one of them expressed impatience, insisting that OSMRE must not delay further in implementing these rules. Specific comments on the entire rule, including the original 1987 proposal and the revised 1988 proposal are discussed in detail below.

A. SECTION 785.17(e) -- REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING -- PRIME FARMLAND.

WITHDRAWAL OF PROPOSED SECTIONS 785.17(e)(1) and 823.11(b)

On March 25, 1987 *(52 FR 9644),* OSMRE proposed to create a limited exemption from the prime farmland restoration and productivity standards, provided certain conditions were met, for prime farmland soils removed in the process of creating water bodies on permit areas containing prime farmland. Proposed Sections 785.17(e)(1) and

823.11(b) were intended to provide this limited exemption from the prime farmland standards for water bodies where the total acreage of prime farmland would not be decreased in the permit area and surface land owner consent was obtained. Under this proposal, operators would have been allowed to plan and install a water body on an area of prime farmland soil as long as the prime farmland soils obtained from the excavation of the water body were handled in conformity with the requirements of Part 823 and an equal amount of prime farmland acreage was reconstructed on non-prime farmland portions of the permit area.

Proposed Sections 785.17(e)(1) and 823.11(b) would have worked in tandem to provide this limited exemption. Under proposed Section 785.17(e)(1), OSMRE would have authorized the approved postmining land use of prime farmland to include impoundments so long as the aggregate premining prime farmland acreage within the permit area was retained and the consent of affected property owners within the permit area was obtained. This would preserve the number of prime farmland acres which were present prior to mining, although there would be a shift in the location of prime farmland soil placement to accommodate the creation of water bodies. All resulting postmining prime farmland would have been required to meet the soil reconstruction and productivity standards of Part 823, with no net loss of prime farmland acreage within the permit area. Protection from the potential economic consequences of shifting the location of prime farmland would have been provided to property owners through the requirement that operators obtain property owner consent before an impoundment would be allowed. Proposed Section 823.11(b) would have granted water bodies created under the authority of proposed Section 785.17(e)(1) an exemption from the restoration and productivity requirements of Sections 823.14 and 823.15.

Among those commenters commenting on the water bodies issue prior to the 1988 reopening of the public comment period were three who were in favor of the 1987 proposal for an exemption and two who were opposed to that proposal. Insofar as their specific comments remain relevant to this final rule, they are discussed below along with the comments received on the revised proposal put forward during the 1988 reopened comment period. Also, during the reopened comment period one commenter reiterated its opposition to the 1987 proposal.

Proposed Sections 785.17(e)(1) and 823.11(b) have been withdrawn and final Section 785.17(e)(5) is promulgated herein.

FINAL SECTION 785.17(e)(5)

As described above, under the 1987 proposed rule, operators would have been allowed an exemption from the prime farmland standards to plan and install a water body in a portion of a permit area provided the prime farmland acreage postmining was not decreased from the premining amount and that surface owner consent was obtained. Although a specific exemption from the Part 823 performance standards for prime farmland was first added to the rules in 1983 *(48 FR 21446*, May 12, 1983), the concept of allowing an exemption can be traced back to 1979 when OSMRE stated that "last cut" lakes were acceptable as an alternative postmining land use on prime farmland *(44 FR 15087*, March 13, 1979). However, the 1983 rules did not include the 1987 proposal's requirement that the postmining prime farmland acreage not be less than the premining prime farmland acreage.

In In re: Permanent II, the National Wildlife Federation challenged the 1983 rule at Section 823.11(b), which set forth an exemption from the prime farmland performance standards for water bodies that had been approved by the regulatory authority as an alternative postmining land use. The district court struck down the exemption and held that it provided a broad and impermissible variance from the postmining use of prime farmland. In re: Permanent II, No. 79-1144, pp. 19-21. The issue was then appealed to the U.S. Court of Appeals, D.C. Circuit. On January 29, 1988, the appeals court affirmed the district court's decision overturning the exemption for last-cut impoundments on prime farmland, noting that section 515(b)(7) "plainly supports the district court's conclusion that a general exception for water impoundments authorizes impermissible postmining uses of prime farmland."

In response to this decision of the appeals court and despite the fact that OSMRE has viewed its March 25, 1987, proposed Section 785.17(e)(1) exemption as consistent with the prime farmland provisions of the Act, since it was meant to maintain the number of prime farmland acres at premining levels as well as to maintain the soil productive capacity of those lands, OSMRE, as indicated above, reopened the comment period on March 23, 1988 *(53 FR 9453)*, to withdraw this proposal and replace it with an alternative more consistent with the court decisions.

OSMRE believes it was generally misleading to characterize the 1987 proposed rule as an exemption. As indicated in the notice reopening the public comment period, OSMRE no longer believes that an exemption to the prime farmland rules is necessary to allow operators to create water bodies within permit areas containing prime farmland so long as the aggregate premining prime farmland acreage within the permit area is retained and certain other conditions are met. OSMRE has further evaluated the relocation of reclaimed soils during contemporaneous reclamation activities on permit areas which contain less than 100 percent prime farmland prior to mining. OSMRE concludes that on such areas, a site on which non-prime farmland soil would otherwise be relocated may be used to create a water body under existing requirements and practices. The shifting of prime farmland soils from a pre-mining location to a post-reclamation location is currently authorized and can properly be considered part of normal practice in restoring prime farmland pursuant to Part 823.

This position is not new. Since 1979, OSMRE has authorized the relocation of prime farmland soils within the permit area. OSMRE stated in a brief filed with the Federal District Court that "The Secretary's regulations provide that small or odd-shaped plots [of prime farmland] can be consolidated and relocated in meeting the reclamation standards of the Act. The only limitations on soil placement pertain to restoration of the soil to insure its productive capacity. There is no requirement, however, that the reconstructed prime farmland soil be placed in the same location as before mining. Therefore, so long as the aggregate amount of prime farmland that is restored equals the amount that existed before mining, the Secretary's reconstruction requirements will be satisfied." In Re: Permanent, Memorandum in support of cross-motion for summary judgment, filed December 21, 1979, at pp. 100-101.

Consequently, when OSMRE reopened the public comment period on the issue of water bodies, it indicated it was interested in determining with greater specificity: (1) How SCS-approved restoration has proceeded in those situations where permit areas contained less than 100 percent prime farmland prior to mining, (2) the extent to which prime farmland soils have been shifted within the permit area from pre-mining to different post-reclamation locations during the typical process of prime farmland restoration, and (3) the extent to which the creation of water bodies has been allowed by regulatory authorities on post-reclamation non-prime farmland portions of permit areas which contained prime farmland soils prior to mining. OSMRE also indicated it was interested in receiving comments on other reasons for relocating prime farmland soils. It was necessary to ask these questions because the creation of water bodies and the relocation of prime farmland soils in the typical permit area containing prime farmland are necessarily linked and whatever regulatory scheme is developed must address the water body issue in that context. This is so because the typical permit area containing prime farmland, contains less than 100 percent prime farmland. When such a permit area is to be surface mined, irrespective of whether a water body is contemplated as a post mining land use, the postmining prime farmland acreage configuration will be changed from the premining configuration as a normal consequence of the properly executed mining and reclamation process. Numerous comments were received in response to the request for comments. These comments and other relevant comments received during the 1987 comment period are addressed below.

A number of comments were received supporting OSMRE's position articulated in its 1988 notice reopening the comment period, on the issue of the creation of water bodies under certain conditions in those permit areas which contain less than 100 percent prime farmland.

Since most permit areas in prime farmland regions do not contain solely prime farmland soils and there were commenters who wanted more certainty concerning under what circumstances water bodies may be created in those permit areas which contain less than 100 percent prime farmland, this final rule clarifies under what circumstances water bodies may be permitted by the regulatory authorities. In essence, such bodies are now and can continue to be allowed whenever there is surface owner consent and (1) the water body will be located on the postmining non-prime farmland portion of the permit area, (2) the aggregate prime farmland acreage existing prior to mining will not be decreased and its soil productivity will be maintained, and (3) the alternative postmining land-use provisions of section 515(b) (2) and (8) of the Act will be met. In every instance, the soil removal, segregation, and stockpiling requirements of Section 823.12 would continue to apply as the water body is being excavated to assure that sufficient reclamation material is available to reconstruct prime farmland within the permit area equal or greater in acreage to that which existed prior to mining. In effect, although the operator must replace all prime farmlands disturbed, they may be moved from their original location to a different location within the same permit area, provided the soil reconstruction and productivity requirements of Sections 823.14 and 823.15, respectively, are met.

A number of 1987 and 1988 commenters, including several state regulatory authorities, confirm and reinforce OSMRE's understanding that the relocation of prime farmland soils within a permit area is normal practice, irrespective of whether water bodies are left in the permit area postmining. OSMRE has also been made aware that relocation of prime farmland soils without any decrease in prime farmland acreage has occurred as part of normal reclamation practice in several states. The construction of water bodies on postmining non-prime farmland portions of permit areas in locations formerly containing prime farmland soils has been performed in conjunction with these soil relocation practices. In fact, a commenter described a net increase in prime farmland acreage after reclamation. These commenters all indicated their support for continuation of the practice so long as the postmining prime farmland acreage is not less than the premining prime farmland acreage. Commenters also indicated that the practice of relocating prime farmland was often necessary or desirable. Relocation of prime farmland soils within a permit area has been allowed by regulatory authorities for a number of valid reasons, including the following:

1. Prime farmland soils areas prior to mining are generally irregular in shape and interspersed with non-prime soils. This makes reconstruction in the same location virtually impossible.

2. Prime farmland soils removed in advance of the mining operation are replaced on areas where rough grading has been completed so as to facilitate the practice of concurrent reclamation and to avoid stockpiling.

3. Prime farmland soils are often grouped during reclamation into larger fields for ease of management and to facilitate an orderly testing of productivity standards.

4. Small isolated areas of prime farmland have been consolidated to improve their farmability.

5. The relocation of prime farmland soils couple with the topographic changes resulting from mining and reclamation occasionally has made it possible for the aggregate total prime farmland acreage to be increased postmining from that which existed prior to mining.

Two commenters stated that, particularly in the last two types of instances, the relocation of prime farmland soils can be beneficial to long-term productivity.

Therefore, viewed in the context of typical soil reclamation practices and applicable restrictions on location, acreage, and productivity, the placement of prime farmland soils so as to allow the creation of a water body can be properly considered as being no different than any other normal and routine relocation of prime farmland soils within a permit area during the reclamation and restoration process. Consequently, no exemption is necessary to allow this practice so long as the pre-mining prime farmland acreage in the permit area is not decreased, any water body created is located on the post-reclamation non-prime farmland portion of the permit area, and all resulting postmining prime farmland meets the soil reconstruction and productivity standards of Part 823. The ultimate effect of such relocation is that certain non-prime farmland soils will be replaced by the impoundment, and the post-mining prime farmland acreage is maintained and relocated within the permit area in a manner and to a degree which has been approved by regulatory authorities in the past.

Because OSMRE referred in the March 25, 1987 proposed rule to a provision for such a change in land use as a proposed exemption where the total acreage of prime farmland is not decreased in the permit area, OSMRE revised its position in the 1988 notice reopening the comment period to make clear that no exemption from the prime farmland criteria will be provided in these rules, since existing rules already allow relocation of prime farmland soils within the permit area.

One commenter stated that water impoundments can only be created through use of the alternative postmining land use provisions of the Act, and that this included the "higher or better use" test. This commenter was concerned that "* * * de facto automatic approval of end cut lake impoundments which sacrifice non-prime cropland" not be allowed. OSMRE agrees that the creation of water impoundments, where none existed previously, can be permitted only through the alternative land use provisions of the Act. Under this final rule that continues to be the only way that they can be allowed. Where non-prime farmland areas are found on permit areas, these areas may be subjected to land use changes, including the creation of water bodies, provided the alternative postmining land use requirements of 30 CFR 779.22, 780.23, 783.22, 784.15, 816.133, and 817.133 are met. No prime farmland would be left unreclaimed, however, and no

prime farmland would be converted to impoundments. OSMRE believes that this approach fully addresses the concerns expressed by the district court and appeals court in In re: Permanent II and NWF v. Hodel.

Therefore, the final rules no longer treat the creation of water bodies as an exemption to Part 823, but clarify existing practices.

As proposed in the March 23, 1988 notice reopening the comment period, Section 785.17(e)(5) would have read as follows:

"(5) Where the permit area contains less than 100 percent prime farmland acreage, the aggregate total prime farmland acreage before and after mining shall not be decreased."

One regulatory authority commented that the proposed regulatory language, when not read in concert with the accompanying discussion, was not clear as to whether the relocation of prime farmland soils is authorized. Another regulatory authority felt the proposed language was awkward and unclear and provided suggested revised language. In addition, two other commenters seemed to have similar problems since both indicated they thought the proposed language could be interpreted to allow the amount of postmining prime farmland acreage in a permit area to be less than the premining amount for permit areas containing 100 percent prime farmland.

OSMRE indicated in its March 23, 1988 notice reopening the comment period that such an interpretation was not, in consideration of the appeals court decision, the intent of the proposal. However, the proposed language read independently of the preamble discussion could have been interpreted in such a manner.

Therefore, OSMRE is in agreement with these commenters and has revised the final rule language at Section 785.17(e)(5) to read as follows:

"(5) The aggregate total prime farmland acreage shall not be decreased from that which existed prior to mining. Water bodies, if any, to be constructed during mining and reclamation operations must be located within the post-reclamation non-prime farmland portions of the permit area. The creation of any such water bodies must be approved by the regulatory authority and the consent of all affected property owners within the permit area must be obtained."

Although the rule language has been revised to address the creation of water bodies within permit areas which contain less than 100 percent prime farmland prior to mining, the net effect has not changed significantly from the March 25, 1987 proposal. This final rule continues to require prime farmland soils removed for water bodies to be separately removed, segregated and stockpiled, but not replaced within the impoundment. These prime farmland soils are to be reconstructed in the same way other prime farmland soils are reconstructed within the permit area and with the review and concurrence of the SCS.

One 1987 commenter stated that, in practical application, this rule would appear to authorize the disturbance of non-prime farmlands and destruction and reconstruction of the soils of borrow areas in order to maintain the pre- and post-mining prime farmland acreage, while allowing for final cut impoundments.

OSMRE does not intend this final rule to allow the disturbance of non-prime farmland areas which would not otherwise be disturbed by mining operations in order to create prime farmland as suggested by this commenter. Because excavated prime farmland soils are removed, stored, and replaced in conformance with Part 823, no borrow areas will be needed to create prime farmland. In other words, prime farmland soils may not be moved from a pre-mining location to a post-mining location within a permit area if the pre-mining area would not normally be disturbed in order to extract the coal. As previously described, when the shifting of the location of prime farmland soils is part of a complete mining and reclamation plan, such soil relocation will be kept to a minimum, will be reviewed and concurred in by the SCS, and must still meet the prime farmland soil reconstruction and bond release standards.

Two commenters objected to the 1987 proposed rule's adjustment of land uses within the permit area, claiming it is illegal because it allows a broad variance from the prime farmland rules. They claim the location of these impoundments has often had the effect of making impractical the large-scale farming of areas due to inappropriate location of the water bodies. They also claim there is no evidence in the record which shows impoundments to be necessary for prime farmland agricultural activity, there is scant data to support the technical capability to create prime farmlands from sub-prime

farmlands, and the system proposed by OSMRE in 1987 would allow coal operators and land owners to make decisions to contravene the express intent of Congress.

OSMRE has no evidence that large-scale farming operations would be affected by any such change in location of prime farmland soils (either under the 1987 or the 1988 proposal), but under final Section 785.17(e)(5) if the property owner/farmer is affected by such a change in the location of prime farmland soils, he will have the opportunity to approve or disapprove of the location change within the permit area before approval. This approval requirement ensures that the viability of farming operations will be considered in any decision to allow the relocation of prime farmland soils.

A number of comments were received on the issue of property owner consent. A 1987 commenter stated that there was no need for property owner consent where an impoundment is proposed as an alternative postmining land use because the premining and postmining prime farmland acreage remains the same. This commenter also noted that the rules should acknowledge that prior consent is acceptable including that found in existing leases. During the 1988 reopening of the comment period, commenters representing industry, environmental and citizen organizations and a regulatory authority remarked that the revised proposal should or must require property owner consent before a water body may be created. No comments were received in opposition to requiring property owner consent during the reopened comment period.

OSMRE agrees with the 1988 commenters and believes specific consent of the current property owner (or property owners) is desirable, especially where a permit area involves more than one property owner and prime farmland acres would be transferred between property owners. Furthermore, OSMRE's existing alternative postmining land use regulations at Sections 780.23(a)(4) and 816.133(c) already require consultation with the property owner. Accordingly, the 1988 proposed language has been revised and final Section 785.17(e)(5) specifies that property owner consent is required.

Various commenters cited reasons why water bodies should be allowed under the conditions stipulated in the 1988 proposal. One regulatory authority remarked that the proposal creates no environmental degradation and may help in creating an agricultural system which is more sustainable than that which existed before relocation, because of the consolidation of small plots of prime farmland, added potential for irrigation, potential for aquaculture, and other uses. Another commenter provided copies of a number of studies which lend support to the proposal. According to this commenter, water bodies on prime farmland serve as a valuable resource for cropland uses, area drainage, recharge areas, and for many farm uses, including irrigation.

Other commenters were either opposed or had concerns about the proposal. One 1987 commenter claimed that an impoundment has a negative impact on agricultural productivity by creating physical barriers to normal movement of farm machinery, by creating farmland areas too small to be economically tilled, and by creating greater water edges which are inherently less productive. For these reasons, this commenter claimed that impoundments have a far greater negative impact on overall productivity than simply replacing a certain number of acres of prime farmland with water. Two 1988 commenters also expressed concern about the possible negative effects of water bodies on prime farmland. One of the 1988 commenters claimed the presence of impoundments have a negative effect on prime farmland's economic viability, suitability for current farm techniques, and crop production, and therefore, that water impoundments are not needed for and can be detrimental to the restoration of prime farmland.

The other 1988 commenter was concerned about the effect of soil erosion on banks surrounding water bodies and about the water quality of such water bodies. This commenter cautioned that without proper design and attention to vegetative cover, water bodies can become sediment basins.

The potential for detrimental effects on prime farmland from nearby water bodies is minimized under these final rules. The requirement that prime farmland acreage remain undiminished after mining, coupled with the Section 823.15 productivity requirements, should preclude the approval of a water body in a location that would result in detrimental effects on prime farmland soils. OSMRE agrees with the second 1988 commenter that proper design and attention to vegetative cover is necessary in the creation of water bodies. The existing performance standards at 30 CFR 816.49(b) require that appropriate measures be taken in this regard and the regulatory authorities under their approved State programs must require such measures prior to approving any reclamation plan which includes the creation of a water body. Furthermore although in some instances the presence of impoundments is capable of producing the negative effects claimed by these commenters, this is not universally true. As noted above, there has been considerable evidence

submitted to the OSMRE administrative record which indicates that the opposite is often true. As a 1987 commenter asserted, water bodies can be needed and highly sought after, especially where there is a monoculture of cropland. The creation of water bodies on the non-prime farmland portions of permit areas is allowed only when the alternative postmining land use criteria of section 515(b) (2) and (8) of the Act have been met. Those provisions, coupled with the standards for restoration of productivity at 30 CFR 823.15, ensure that any impoundments created will not have a negative effect on prime farmland productivity.

Another 1987 commenter was skeptical of the likelihood of enhancing acreage classified as non-prime farmland to achieve prime farmland and suggested that OSMRE should have performance standards for creating prime farmland. This commenter pointed out that other portions of the prime farmland rules need to be amended to make the rule work, e.g. soil maps in permitting; avoid small isolated areas of prime farmland soils; the SCS should be involved in evaluating technological capability; soil removal, stockpiling, and replacement performance standards must be set forth in detail. This commenter stated that without these, the rule is not workable.

As described above, OSMRE, regulatory authorities and the SCS have had successful experience in moving prime farmland soils within permit areas. For instance, the natural progression of a typical surface mine in the mid-west will relocate prime farmland soils three to four spoil ridges from the original location when contemporaneous reclamation is practiced (that is, immediate soil removal and replacement where soil storage is not necessary). Also, in the past, OSMRE and the SCS have encouraged the physical relocation and consolidation of small odd-shaped parcels of prime farmland, thus benefitting the mine operator and property owner/farmer. The commenter, in suggesting small isolated areas of prime farmland soils be avoided, also implies that prime farmland soils are farmed differently than non-prime farmland soils, which is not the case. Typically, farms do not work isolated parcels of prime farmland soils any differently than the surrounding non-prime farmland soils. Therefore, since prime farmland soil boundaries are not delineated by legal or farming boundaries, such as fence rows or county lines, OSMRE expects that prime farmland soils would be farmed identically, without distinction or demarcation from the non-prime farmland soils. For example, a large field of wheat may contain only 40 percent prime farmland due to the topography and hydrology of the field; yet the field of wheat is farmed as one unit, rather than two units, one prime and one non-prime.

OSMRE believes that for economic reasons the mine operator will rebuild the prime farmland soils as close to the original prime farmland location as possible due to the cost of transporting soils. Where this displacement is part of a complete mining and reclamation plan, prime farmland soil displacement will be kept to a minimum, will be reviewed and commented upon by the SCS, and must still meet the prime farmland soil reconstruction and bond release standards. Contrary to the commenter's view, OSMRE believes that the present prime farmland soil reconstruction specifications, supplemented with the specific SCS soil reconstruction specifications for each State, are sufficient to guarantee equal or higher levels of soil productivity for relocated prime farmland soils. OSMRE does not see the need for an alternative set of soil reconstruction specifications for relocated prime farmland soils.

Three 1988 commenters addressed the issue of allowing the creation of water bodies which would replace prime farmland as the postmining land use. One commenter noted it would prefer the flexibility to construct a permanent impoundment without the necessity of creating compensating prime farmland. A second commenter was not sure whether OSMRE was in fact proposing an exemption for water bodies that are necessary or beneficial for cropland land uses. This commenter asked that it be given the opportunity to review and comment on any such proposal before implementation. The third commenter suggested that, provided the property owner consents, an exemption should be permitted to allow water bodies in lieu of prime farmland under any of the following circumstances:

1. Where the aggregate prime farmland acreage would be retained, or

2. The impoundment is necessary or beneficial for cropland use, or

3. There is another appropriate postmining land use for the impoundment.

Concerning the first circumstance, as described above, a water body may be placed at a location where there was prime farmland before mining, if the prime farmland acreage will be relocated and not reduced, the alternative postmining land use criteria are met, and property owner consent is obtained. Regarding the second circumstance, the court has indicated that a narrow exemption might be acceptable in situations where an impoundment is necessary or beneficial. OSMRE believes that whether an impoundment is necessary or beneficial is so dependent on site-specific factors such as

geology, hydrology, topography, soils, and climate that nationwide standards for creating such an exemption may not be practicable and, at a minimum would require much additional research before any attempt at promulgation. Therefore, the agency does not intend either to propose or to implement such an exemption at this time. The third circumstance, taken alone, would not provide an independent basis for an exemption in view of the court decisions that prime farmland cannot be replaced by any other postmining land use.

Two 1988 commenters emphasized that the court rulings require that all prime farmland be reclaimed to prime farmland cropland postmining without any exceptions and, therefore, the prime farmland acreage in a permit area must be the same after mining as before mining.

OSMRE agrees that all prime farmland must be reclaimed to prime farmland cropland after mining. The final rule does not eliminate the requirement that all prime farmland be reclaimed to prime farmland cropland after mining. Although the final rule does not require that the prime farmland acreage in the permit areas always must be in the same location after mining as before, it does require that postmining prime farmland acreage never may be less than premining prime farmland acreage. Thus the rule is consistent with the Act.

Two commenters felt that proposed Section 785.17(e)(5) was unnecessary. One of these commenters indicated that since existing Section 785.17(e)(1) requires all prime farmland to be reclaimed to prime farmland cropland postmining that Section 785.17(e)(5) was redundant. The other commenter indicated it thought OSMRE intended proposed Section 785.17(e)(5) to allow a postmining decrease in prime farmland acreage in permit areas containing 100 percent prime farmland prior to mining. Thus the commenter concluded the 1988 proposal was illegal.

Since neither proposed nor final Section 785.17(e)(5) allow a postmining decrease in the prime farmland acreage, the rule cannot be illegal for that reason.

OSMRE believes the rule is necessary for several reasons. First, the comments received during the public comment period, and especially during the March 23 to May 12, 1988 reopened comment period clearly indicate uncertainty as to whether and under what circumstances water bodies can be allowed on permit areas containing prime farmland. Second, there also appears to be uncertainty over whether and how the relocation of prime farmland during reclamation is authorized. Third, under typical geologic, hydrologic and topographic conditions, the most common type of permit area containing prime farmland will be the permit area with less than 100 percent prime farmland. For these reasons, whether and where water bodies may be located in permit areas containing prime farmland is linked to the practice of relocating prime farmland. Thus, the proper implementation of the prime farmland requirements of the Act for the typical permit area (containing less than 100 percent prime farmland) is critical for providing the protections Congress intended for prime farmland.

A commenter claimed that the question of when and where impoundments are permissible should not be addressed as part of this rulemaking because, in this commenter's view, the only legitimate provisions in prime farmland rules relating to impoundments are a clear prohibition of them as a postmining land use on prime farmland, and a requirement that their presence elsewhere not detract from prime farmland restoration. The commenter further contended that any rules providing for postmining relocation or consolidation of premining land classes, uses or capabilities should be part of a separate rulemaking specifically on that subject because any such effort in the context of this rulemaking would be illegal under the requirements for adopting federal regulations.

OSMRE disagrees with this commenter's views. As discussed above in response to those commenters who claimed Section 785.17(e)(5) was unnecessary, the question of how and where impoundments are permissible on areas containing prime farmland is necessarily linked to this prime farmland rulemaking. Since many permit areas containing prime farmland contain less than 100 percent prime farmland, they will be candidates for the creation of water bodies. In light of the necessity to respond to the decision in NWF v. Hodel, and the uncertainty expressed by commenters on this rulemaking, clarification of how such situations are to be treated is both appropriate and necessary to this rulemaking.

More importantly, these rules are not intended to serve and do not serve to authorize the postmining relocation or consolidation of premining soils or uses. That authority already exists under current Section 785.17(e)(1) which is not being revised by this final rule. As discussed previously the postmining relocation and/or consolidation of prime farmland has been and will continue to be a legitimate part of normal reclamation practice. This rulemaking merely clarifies for those interested parties who have been heretofore unsure, that such practices have been and continue to be authorized. It

is intended, especially, to show that, under certain conditions, a water body legitimately approved under the alternative postmining land use provisions of the Act may be created and located where prime farmland existed prior to mining without resulting in the illegal replacement of prime farmland by a water body.

One commenter stated that all prime farmland must be restored to cropland and subject to the complete prime farmland requirements. OSMRE agrees. These final rules do not change that existing requirement.

This same commenter, addressing a related issue, claimed OSMRE has an obligation to ensure that reclamation plans and postmining land use plans for all permits containing prime farmland do not in any way limit the restoration and postmining productivity for every acre of prime farmland and that this responsibility includes a careful review of the interaction of prime farmland with other aspects of the permit. OSMRE agrees, all reclamation plans and postmining land use plans must not limit the restoration and postmining productivity of any prime farmland. This final rule does not change that existing requirement. However, in primacy states the regulatory authorities under their approved State programs, not OSMRE, have the primary responsibility to ensure that these requirements are met.

On yet another related subject, this commenter insisted that water bodies, if allowed as an alternative postmining land use on non-prime farmland, cannot be allowed to diminish prime farmland's farmability or productivity. OSMRE agrees that an alternative postmining land use on adjacent nonprime farmland must not diminish prime farmland's productivity. Section 510(d)(1) of SMCRA requires prime farmland soil to be restored, within a reasonable amount of time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management. This requirement is implemented by the performance standards at 30 CFR 823.15(b). Regulatory authorities have the responsibility to disapprove any alternative postmining land use plans they believe will preclude meeting the productivity standards. Therefore, if a regulatory authority determines that the location of a water body, as an alternative land use for non-prime farmland, would result in non-attainment of the Section 523.15(b) productivity standards for nearby prime farmland, it is the responsibility of that regulatory authority to reject the proposed alternative land use plan.

Lastly, a regulatory authority commenting on the 1987 proposed rules suggested that provisions are needed in Section 785.17 to provide for an applicant to document if the exemption criteria of Section 823.11(a)(1)(i) are met and, if so, to be excluded from the requirements of Section 785.17 (c), (d), and (e). As detailed below, under discussion of Part 823, proposed Section 823.11(a)(1)(i) has not been adopted in this final rule. If prime farmland is to be reconstructed elsewhere in the permit area, the applicable provisions of Sections 785.17 and 800.40 and Part 823 do apply to these relocated prime farmland soils.

B. SECTION 823.11 (a) and (b) -- SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS -- OPERATIONS ON PRIME FARMLAND

PROPOSED 3 PERCENT EXEMPTION FOR SURFACE FACILITIES

Proposed Section 823.11(a)(1)(i) provided for an exemption from the prime farmland standards for those coal preparation plants, support facilities, and roads which are actively used over extended periods but which affect a minimal amount of land in connection with underground mines. The exemption proposed was for an area not to exceed 3 percent of the underground extraction area for the life of the mine. OSMRE received a number of comments critical of the proposed exemption.

Two commenters stated that the exemption allowed was excessive and irrational and that no rationale is presented for such an excessively large surface disturbance, especially since disposal areas are being treated independently of this exemption. One of these commenters asserted that current mines in Illinois would receive exemptions of 24 to 369 acres. The commenter believes OSMRE has provided no basis for demonstrating that increasing the real extent of underground workings necessarily increases the size of a preparation facility or of a road from the mine.

One regulatory authority pointed out that certain surface facilities, e.g. preparation plants, may be issued separate permits from those issued for one or more underground mines which ship their coal to that preparation plant. Also, some underground mines may contract their refuse removal and disposal to another party who is issued a separate permit to dispose of waste from that mine. In such situations the regulatory authority is dealing with one mine complex operated

with multiple permits. Clearly, a standard such as the proposed 3 percent of permit area, makes little sense in respect to multiple-permit mine complexes.

One commenter suggest that OSMRE include a provision whereby the regulatory authority may expand the 3 percent spatial limit where unique circumstances exist. This commenter pointed out that OSMRE's choice of 3 percent spatial limitation arises from the mean for current permits within Illinois and that half of the operations contained in the survey already exceeded the mean. Therefore these operations were permitted under the existing standard for "affecting a minimal amount of land." This commenter felt that circumstances will arise where a well-planned mine will require greater spatial accommodation than the 3 percent standard, while still affecting a minimal amount of land.

Despite their different perspectives, each of these comments has some merit. Although OSMRE continues to believe that there is a rational basis for assuming that increases in the extent of underground workings correlate with an increased requirement for surface facilities area, it is no longer convinced, especially in view of the nature of the types of operations being separately permitted (i.e., not all permit areas are mines and an individual mining operation may be composed of several distinct permit areas), that the proposed 3 percent spatial limitation is either appropriate or practical to administer. OSMRE now believes that some other percent or some fixed acreage maximum related to entire mining operations, rather than to permit areas, would be more varied. It has become apparent from a review of the data currently available to OSMRE that the regulatory authority that commented about the relationship of permit areas to mines has raised a critical issue and that determining the appropriate exemption for a mining operation in a typical prime farmland State, such as Illinois, is not possible without collecting data on an operation by operation rather than on a permit basis. Such data is not currently available to OSMRE in a usable form. Therefore, OSMRE is postponing final rulemaking on this issue pending further study. Existing Section 823.11(a), as modified by the February 21, 1985 suspension notice *(50 FR 7278),* is being retained in the interim.

EXCLUSION FOR COAL MINE WASTE STORAGE AREAS

Proposed Section 823.11(a)(1)(ii) provided an exception from the exemption of proposed Section 823.11(a)(1)(i). Final Section 823.11(b) has replaced proposed Section 823.11(a)(1)(i) and provides an exclusion from the prime farmland performance standards of Part 823 for coal mine waste storage areas associated with underground coal mines.

The exclusion for coal mine waste storage areas applies only where the coal mine waste from underground mines cannot be technologically and economically stored in underground mines or on non-prime farmland. The operator must continue to avoid prime farmland areas where possible, and must show that the waste cannot be stored underground or on non-prime farmland because of technological and economic factors. Also, the operator must minimize the surface area used for storing waste, and must restore these coal mine waste storage areas in accordance with the criteria found in Section 817.83. The bond release criteria for these coal mine waste storage areas include the soils and revegetation requirements of Sections 817.22 and 817.111 through 817.116.

Justification for final Section 823.11(b) is found in Section 516 of SMCRA, which requires consideration of the distinct differences between surface and underground coal mining. Some of these differences with respect to coal mine water are: (1) The greater availability of disposal sites for coal mine waste at surface mines; (2) the technological and economic feasibility for placing the waste into the underground mining excavations; (3) the relative restrictions on waste storage related to health and safety of miners at surface and underground mines; and (4) current coal mine waste disposal techniques for surface and underground mines.

Coal mine waste disposal areas are more available at surface mines than at underground mines because of the surface operator's access to the open pit for waste disposal. Also, the need for coal mine waste storage areas for surface mines is generally less because proportionately less waste is created by surface mines. The technological and economic feasibility of returning coal mine wastes to active or inactive underground coal mines is uncertain, as was reported in the National Academy of Sciences report "Underground Disposal of Coal Mine Wastes" (NAS, 1975). In the proposed rule, OSMRE specifically requested comment on the technological and economic feasibility of returning coal mine waste to active and inactive underground coal mine workings. Two commenters supported the exclusion for coal mine waste storage areas, while two did not.

One of the two commenters who opposed the proposed exclusion asserted that the disposal of coal development and processing waste is not unique to underground mining, the inclusion of an economic feasibility test for allowing waste

disposal on prime farmlands makes protection of such lands servient of economic advantage, and the failure of OSMRE to set any limitations on the size or location of such waste disposal areas creates a direct conflict between such a proposal and the district court's decisions in In re: Permanent and In re: Permanent II. Both commenters agreed that section 516 allows a certain degree of flexibility in the adoption of standards for surface and underground mining based on the differences in the mining practices themselves, but not in the disposal of wastes common to both forms of mining. One of these commenters felt that waste disposal must occur by a return to underground workings, where approved, or by surface disposal on non-prime farmland areas. Another commenter, citing an article which appeared in the March 1986 edition of Coal Age Magazine, stated that evidence exists to suggest that on both technological and economic grounds, the disposal of coal mine waste to the underground workings is a feasible alternative.

OSMRE's position remains essentially as discussed at *48 FR 44015* on September 26, 1983, with respect to this issue. OSMRE disagrees with the commenter who believes that coal mine waste must be disposed only by a return to underground workings or by surface disposal on non-prime farmland areas. The Act does not contain such a requirement. The impact of coal mine waste from underground mines is regulated under section 516(b)(3) through (5) of SMCRA. Section 516(b)(3) requires the return of coal mine waste to the underground mine workings "to the extent technologically and economically feasible." Neither section 516(b)(4) nor (5), which establish requirements for the surface disposal of coal mine wastes, provides any specific protections for prime farmlands. Prime farmland protections are provided under section 515 of SMCRA, which applies to surface mines. Section 516(b)(10) makes section 515 applicable to those surface impacts of underground mining which are not specified in section 516(b). Since surface impacts of coal mine waste from underground mines are regulated in section 516(b), no further restrictions can be incorporated by application of section 516(b)(10), and the section 515 prime farmland standards do not apply to underground coal mine waste disposal sites. On January 29, 1988, in *NWF v. Hodel, 839 F.2d 694 at pp. 739-741,* the holding of the U.S. Court of Appeals (D.C. Cir.) was consistent with this concept. In ruling on an attempt by OSMRE to use section 516(b)(10) as the legal justification for applying the general restoration duties of the section 515 requirements, which otherwise only apply to surface mining, to surface lands damaged by subsidence, the district court held that "* * * section 516(b)(10) is triggered only by 'surface impacts not specified' " elsewhere in section 516(b). *NWF v. Hodel, 839 F.2d at pp. 740-741.* Thus, the surface disposal of coal mine wastes is not subject to the requirements to protect prime farmland found in section 515 of SMCRA and implemented at 30 CFR Part 823. Nevertheless, OSMRE is requiring in section 823.11(b) that the operator minimize the area of prime farmland used for surface disposal of that coal mine waste which cannot, for technological and economic reasons, be returned to the underground workings.

OSMRE also has examined the Coal Age article in question and concluded that it does not support the commenters' conclusion that disposal of coal mine waste to underground workings is a feasible alternative. The article reports that some technological progress has been made with pneumatic stowing methods and that as a result the economics are improving. Specifically, the article states that applications of pneumatic stowing "appear to be showing economic promise." Then, after stating "it is probably true that pneumatic stowing is currently still more costly than traditional [surface] disposal methods," the article concludes that the economic viability of pneumatic stowing may now have reached the point where for certain specific operations it may be desirable to examine the site specific economics.

More significantly, however, the article does not address other critical issues which are the concern of the Mine Safety and Health Administration (MSHA) and the Environmental Protection Agency (EPA). Each area proposed for coal mine waste storage must also be evaluated on the basis of site specific environmental, health, safety, and other considerations. Any plan to return coal mine waste to underground workings would require close coordination with both MSHA and EPA and must be arranged by the regulatory authority and coal mine operator. In most cases, the MSHA and EPA requirements, combined with what are, at least, the marginal economics of pneumatic stowing, will render the return of coal wastes to underground workings technologically and economically unfeasible. An extensive discussion of MSHA and EPA concerns was published at *48 FR 44015* (September 26, 1983). Therefore, OSMRE remains unconvinced that underground waste disposal is consistently or typically a viable nationwide alternative.

One State regulatory authority commented that the determination of technologic and economic feasibility will likely result in very subjective and inconsistent evaluations by regulatory authorities, and suggested that further guidance is needed. However, since the phrase "technologically and economically feasible" is the precise wording of section 516(b)(3) of the Act, OSMRE believes that any determination of the technological and economic feasibility of returning coal mine wastes to underground workings must be performed by the regulatory authority, which must consider all relevant information provided by the coal mine operator when the regulatory authority reviews the mining and reclamation plans. As described in the March 1986 Coal Age article discussed above, the technological and economic

evaluation of this alternative is extremely complex and must be evaluated on a site-by-site basis. OSMRE believes that no further guidance is possible or appropriate at the national level because of the site-specific nature of this problem.

Two commenters supported this exclusion. In expressing support, one of the two noted that the technological and economic feasibility of returning coal mine waste to active and inactive underground coal mine workings remains limited. In this context, the commenter mentions that the technological and economic feasibility of returning such waste to underground workings is dependent on whether the approval of both MSHA and EPA can be obtained. As OSMRE has indicated above, such approval is often unobtainable.

This same commenter also suggested that slurry ponds should be recognized as part of the coal mine waste exclusion. OSMRE agrees and refers the reader to *48 FR 44009-10*, September 26, 1983, where an extensive discussion of "coal processing waste," "coal mine waste," and "impounding structures" can be found. The discussion found there clarifies that the term "impoundments" includes dams and embankments designed to hold coal mine waste slurry or sediment in a semi-liquid state. The coal mine waste impounding structure rules augment and do not replace the rules governing impoundments.

A regulatory authority was unclear as to whether coal refuse disposal areas would be included in this exclusion. OSMRE believes that a "refuse pile" may contain coal processing waste and/or underground development waste, both of which are included in this exclusion, providing that they are derived from underground sources. *(48 FR 44010*, September 6, 1983)

Another commenter had no objections to the proposed rule provided that OSMRE clarified that the waste disposal area includes areas where soil cover is obtained to meet the requirements of Section 817.83 when sufficient cover cannot be obtained immediately below the coal waste or from nonprime farmland areas. OSMRE's rule at Section 817.83(c)(4) requires that waste disposal areas are to be covered by 4 feet of the best available material, or less than 4 feet as approved by the regulatory authority if there is a demonstration that the coal mine waste storage area will meet the revegetation and environmental protection provisions of the revegetation rules at Sections 817.111 through 817.116. In conformity with the requirements of Section 817.83(c)(4), it is appropriate for the regulatory authority to consider site-by-site variations. Nevertheless, OSMRE does not intend to require, and does not expect the regulatory authority to require, the operator to create borrow areas to obtain cover materials, unless such borrow areas are necessary to prevent combustion or ensure that the revegetation requirements are met. Also, since these coal mine waste storage areas are created pursuant to section 516(b)(3) through (5), they are excluded from the prime farmland soil reconstruction and productivity requirements of 30 CFR 823.14 and 823.15, as those requirements implement section 515 of SMCRA.

C. PROPOSED SECTION 823.11(a)(2) -- "GRANDFATHERED" PRIME FARMLAND

Existing Section 823.11(c) states that the requirements of Part 823 are not applicable to prime farmlands that have been excluded in accordance with Section 785.17(a) of this Chapter, that is, "grandfathered" prime farmland.

On March 25, 1987 *(52 FR 9644)*, OSMRE proposed to redesignate existing Section 823.11(c) as Section 823.11(a)(2). This final rule does not require Section 823.11(c) to be redesignated. No change other than redesignation was proposed or contemplated. Therefore, the "grandfathered" prime farmland provisions of the May 12, 1983 final rules remain unchanged, and at Section 823.11(c).

D. PROPOSED SECTION 823.11(b) -- WATER BODY EXEMPTION

As described at length above, proposed Sections 823.11(b) and 785.17(e)(1) if adopted, would have provided an exemption from the prime farmland performance standards for water bodies that have been approved by the regulatory authority as an alternative post-mining land use as long as the same number of prime farmland acres before mining were reconstructed after mining. Proposed Section 823.11(b) would have excluded those areas on which impoundments were authorized by proposed Section 785.17(e)(1) from the soil reconstruction and productivity requirements of Sections 823.14 and 823.15, respectively. In practice, however, that exemption would have been almost meaningless in view of the requirement of Section 785.17(e)(1) that the same number of prime farmland acres be present postmining as premining. That requirement, as a practical matter, would have necessitated the relocation and reconstruction of those prime farmland soils elsewhere in the permit areas.

During the reopened comment period two commenters supported the elimination of proposed 30 CFR 823.11(b) which would have exempted impoundments from the soil replacement and proof of productivity requirements for prime farmlands. One of those commenters felt that the notice of reopening of the comment period did not clearly withdraw that proposed language.

The 1988 notice of reopening of the comment period did propose the withdrawal of 30 CFR 823.11(b) and, more importantly, this final rule does withdraw proposed 30 CFR 823.11(b) as supported by these commenters.

As this final rule clarifies, operators are allowed to remove, store, and utilize elsewhere in a permit area prime farmland soils disturbed in mining for coal. Section 785.17(e)(1) in conjunction with Sections 823.12, 823.14, and 823.15, which require prime farmland soils removed for water bodies to be separately removed, segregated and stockpiled, but not replaced within the impoundment, produces this result. These prime farmland soils are reconstructed in the same way other prime farmland soils are reconstructed within the permit area and with the review and comment of the USDA, Soil Conservation Service and the concurrence of affected property owners within the permit area. Thus, there is no impermissible broad variance from the prime farmland standards because prime farmland soils are removed, stored, and replaced in accordance with Part 823 and the same or greater number of prime farmland acres are restored within the permit area after mining than there were before mining.

As indicated above, proposed Section 823.11(b) has been withdrawn.

E. SECTIONS 823.12(c)(2) and 823.14(d) -- SOIL REMOVAL AND STOCKPILING; SOIL REPLACEMENT -- EXCEPTIONS FOR B AND C SOIL HORIZONS WHICH OTHERWISE WOULD NOT BE REMOVED BY MINING ACTIVITIES

Section 515(b)(7) of SMCRA requires that for all prime farmlands to be mined and reclaimed, the Secretary of Agriculture shall establish specifications for soil removal, storage, replacement, and reconstruction, and that the mine operator shall be required to segregate, store, and replace prime farmland soils. This provision is implemented in 30 CFR 823.12 and 823.14. However, in areas that are not mined and where the B and C soil horizons would not otherwise be removed, such as areas beneath surface support facilities, B and C horizon removal and segregation may serve little purpose. Therefore, final Sections 823.12(c)(2) and 823.14(d) authorize the regulatory authority to approve an exception from the requirement to remove and reconstruct the B and C soil horizons when the B and C horizons would not otherwise be removed by mining activities. Although the B and C soil horizons would not be removed under this final rule, as indicated in the Secretary's Memorandum in support of cross motion for summary judgment, filed December 21, 1979, at pp. 100-101 (In re: Permanent), the requirement to reestablish the productive capacity of the prime farmland soil must still be met. In its In re: Permanent opinion, the court summarized the soil handling requirements in such situations as follows: "[A]n operator need only engage in deep tilling to restore compacted land to prime farmland where support facilities have compacted the soil. The operator would still, however, be required to engage in a pre-application investigation and also comply with the permit and bonding requirements." (In re: Permanent at 3, footnote 4.)

OSMRE agrees with the court's summary, but also recognizes that there may be instances when the B or C soil horizons may need to be protected from chemical or other types of contamination in order to achieve the applicable vegetative cover and productivity required by Sections 800.40 and 823.15. Under existing Section 816.22(e), as well as under Part 823, the regulatory authority could require that the B or C soil horizons be separately removed, segregated, stockpiled, and replaced to ensure retention of soil capabilities. The regulatory authority also could provide the operator the option to preserve the productive capacity of prime farmland soils in place by taking measures such as placing a protective barrier between the surface coal mining activity causing contamination and the B and C soil horizons.

Three commenters approved of this exception, while one commenter objected. One commenter felt that this exception is absolutely necessary in light of OSMRE's proposal to restrict substantially the support facility exemption from the prime farmland standards. Another commenter, a regulatory authority, concurred. However, it stated that special provisions should be made for leaving the A horizon in place for minor disturbances such as in Section 816.22(a)(3). This regulatory authority believes that Section 816.22(a)(3) is applicable to prime farmland situations as well. OSMRE agrees with this regulatory authority that the narrow exceptions allowed for insignificant disturbances of topsoil also refers to prime farmland soils. See *48 FR 22094,* May 16, 1983, which applies to all topsoil, including that of prime farmland, for a full discussion of this concept.

Another commenter stated that this blanket exception is inappropriate and inconsistent with the Act. This commenter stated that while there may be situations in which B and C soil horizon removal may not be necessary, there are other circumstances in which it is necessary. This commenter's concerns are about soil compaction, soil horizon loss, and soil chemical contamination. This commenter also felt that protection of the from contamination should be incorporated into the regulations and not simply noted in the preamble. OSMRE agrees and has added the phrase "* * * and where soil capabilities can be retained" to Section 823.12(c)(2). In this manner prime farmland sub-soils will be protected from all forms of contamination as well as compaction.

F. SECTION 823.15(b) -- PRIME FARMLAND SOIL PRODUCTIVITY

Neither OSMRE's 1987 proposal nor its 1988 revised proposal attempted to make any changes to the revegetation success standards for reconstructed prime farmland found at 30 CFR 823.15(b). Nevertheless, a regulatory authority commenting during the reopened comment period recommended OSMRE develop a rulemaking which would allow the evaluation of soil properties to be used as an alternative to cropping for demonstrating the productivity potential of reconstructed prime farmlands.

As mentioned above, existing Section 823.15(b) requires, as the measure of soil productivity, the actual growth of crops. Before revegetation will be accepted as successful, average yield of the restored soil over a period of three or more crop years must equal or exceed the average yield of a carefully selected comparison area. The legality of this requirement was challenged by Industry in In re: Permanent II and the U.S. District Court upheld OSMRE's position as a reasonable exercise of its discretion. Industry subsequently appealed the district court's decision to the U.S. Court of Appeals, D.C. Circuit. On January 29, 1988 the appeals court upheld the district court decision. See NWF v. Hodel at 718. While OSMRE is not incorporating the suggested change, when the necessary techniques are available to use surveys of reconstructed prime farmland soils for the purpose of predicting productivity OSMRE will consider such a rulemaking. However, in consideration of the uncertainty surrounding the method suggested, OSMRE does not intend to propose any change to the requirements of Section 823.15(b) at this time.

REFERENCE MATERIAL

Coal Age, Vol. 21, No. 3, March 1986, Pneumatic Stowage Becomes Affordable, 5 pp., James M. Roberts et al. (See Administrative Record.)

NAS (National Academy of Sciences), 1975, Underground disposal of coal mine wastes, 172 pp. (See Administrative Record No. 406.)

Office of Technology Assessment, Congress of the United States, December, 1985, Staff Memorandum, Reclaiming Prime Farmlands and Other High-Quality Croplands After Surface Coal Mining, 143 pp. (See Administrative Record No. 1005E.)

Economic Research Service, U.S. Department of Agriculture, August, 1981, Rural Development Research Report Number 29, Coal Development in Rural America -- The Resources at Risk, 84 pp. (See Administrative Record No. 919E.)

Effect In Federal Program States

The final rules are applicable through cross-referencing in those States with Federal programs. This includes California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. OSMRE specifically requested comment as to whether unique conditions exist in any of these Federal program States which should be reflected either as changes to the national rules or as State-specific amendments to any or all of the Federal programs. No comments were received in response to this request.

III. PROCEDURAL MATTERS

Executive Order 12291

The Department of the Interior (DOI) has examined these final rules according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that these are not major rules within the standards established by the

Executive Order and, therefore, no regulatory impact analysis is required. These rules allow certain exclusions from the prime farmland soil reconstruction provisions of Part 823, thus lessening the regulatory burden in special situations for coal preparation plants, support facilities and roads, and certain coal waste disposal areas associated with underground mining.

Federal Paperwork Reduction Act

There are no information collection requirements in these final rules requiring review by the Office of Management and Budget under *44 U.S.C. 3507*.

Regulatory Flexibility Act

The DOI has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that the final rule will not have a significant economic impact on a substantial number of small entities.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) on the impacts on the human environment of this rulemaking. This EA is on file in the OSMRE Administrative Record at the address listed in the "Addresses" section of this preamble.

Authors

The authors of this regulation are Dermot M. Winters and Donald F. Smith, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; telephone Mr. Winters at (202) 343-1928 (Commercial or FTS).

LIST OF SUBJECTS

30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Surface Mining Reclamation and Enforcement Office, Underground mining.

30 CFR Part 823

Agriculture, Environmental protection, Surface mining, Surface Mining Reclamation and Enforcement Office, Underground mining.

Accordingly, 30 CFR Parts 785 and 823 are amended as follows:

Date: August 26, 1988.
J. Steven Griles, Assistant Secretary -- Land and Minerals Management.

PART 785 -- REQUIREMENT FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

1. The authority citation of Part 785 is revised to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq.; Pub. L. 100-34.

2. Paragraph (e) of Section 785.17 is amended by adding a new paragraph (e)(5) to read as follows:

SECTION 785.17 - PRIME FARMLAND.

* * * * *

(e) * * *

(5) The aggregate total prime farmland acreage shall not be decreased from that which existed prior to mining. Water bodies, if any, to be constructed during mining and reclamation operations must be located within the

post-reclamation non-prime farmland portions of the permit area. The creation of any such water bodies must be approved by the regulatory authority and the consent of all affected property owners within the permit area must be obtained.

PART 823 -- SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS -- OPERATIONS ON PRIME FARMLAND

3. The Authority citation for Part 823 is revised to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq.; Pub. L. 100-34.

4. Section 823.11 is amended by removing the suspension of paragraph (b) and revising it and republishing the introductory text to the section to read as follows:

SECTION 823.11 - APPLICABILITY.

The requirements of this part shall not apply to --

* * * * *

(b) Disposal areas containing coal mine waste resulting from underground mines that is not technologically and economically feasible to store in underground mines or on non-prime farmland. The operator shall minimize the area of prime farmland used for such purposes.

* * * * *

5. The first sentence of Section 823.12(c)(2) is revised to read as follows:

SECTION 823.12 - SOIL REMOVAL AND STOCKPILING.

* * * * *

(c) * * *

(2) Separately remove the B or C soil horizon or other suitable soil material to provide the thickness of suitable soil required by Section 823.14(b), except as approved by the regulatory authority where the B or C soil horizons would not otherwise be removed and where soil capabilities can be retained. * * *

* * * * *

6. Section 823.14(d) is revised to read as follows:

SECTION 823.14 - SOIL REPLACEMENT.

* * * * *

(d) The operator shall replace the B horizon, C horizon, or other suitable material specified in Section 823.12(c)(2) to the thickness needed to meet the requirements of paragraph (b) of this section. In those areas where the B or C horizons were not removed but may have been compacted or otherwise damaged during the mining operation, the operator shall engage in deep tilling or other appropriate means to restore pre-mining capabilities.

* * * * *

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